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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

MICHELLE CHRISTINA RIVERA

Plaintiff.

vs.

COUNTY OF SAN DIEGO, et al..

Defendants.

Case No. 5:16-cv-00795 PSG-
KSx

**PLAINTIFF'S PROPOSED
JURY INSTRUCTIONS
DISPUTED BY
DEFENDANTS**

Trial: June 13, 2017

TO THE HON. PHILIP S. GUTIERREZ, UNITED STATES DISTRICT JUDGE:

Per this Court's Order For Jury Trial, Plaintiff hereby submits her jury instructions which are objected to by defendants.

DATED: May 26, 2017

DONALD W. COOK
Attorney for Plaintiff

Bv

Donald W. Cook

No.	Title	Authority	Page
1	All Persons Equal before the Law	Devitt, Blackmar & Wolff, 3 Federal Jury Practice and Instructions §§ 71.03 (4th ed. 1987); <i>Graham v. Richardson</i> , 403 U.S. 365, 371, 372 (1971); <i>Takahashi v. Fish & Game Comm.</i> , 334 U.S. 410, 420 (1948); <i>Yick Wo v. Hopkins</i> , 118 U.S. 356, 369 (1886); <i>Truax v Raich</i> , 239 U.S. 33, 39 (1915)	4
3	Testimony of Police Officer	<i>Darbin v. Nourse</i> , 664 F.2d 1109, 1114-15 (9th Cir. 1981)	7
4	Business Records -- Police Reports	F.R.E. Rule 803 (6), (7), (8), (10); California Evidence Code §§ 1270, 1272; 28 United States Code §§ 1732, 1733; <i>United States v. DeGeorgia</i> , 420 F.2d 889 (9th Cir. 1969)	10
5	Evidence of Guilt from Fabrication/Coverup	<i>Reeves v. Sanderson Plumbing Products, Inc.</i> , 530 U.S. 133, 147 (2000); <i>United States v. Davis</i> , 752 F.2d 963, 972 (5th Cir. 1985); <i>Charles v. Cotter</i> , 867 F. Supp. 648, 663 (N.D. Ill. 1994)	13
11	Serious Bodily Injury--Defined	<i>United States v. Sanchez</i> , 914 F.2d 1355, 1358-59 (9th Cir. 1990); <i>United States v. Moore</i> , 846 F.2d 1163, 1166, 1167 (8th Cir. 1988); <u>Cal. Penal Code</u> §§ 243(f)(5); <i>People v. Escobar</i> , 3 Cal.4th 740, 746, 752 (1992); <i>People v. Johnson</i> , 104 Cal. App. 3d 598, 609 (1980); <i>Gonns v. United States</i> , 231 F.2d 907, 908 (10th Cir. 1956); <i>United States v. Moore</i> , 846 F.2d 1163, 1164, 1167 (8th Cir. 1988); <i>People v. Pallins</i> , 95 Cal. App. 2d 902 (1950); <i>In re Jose D.R.</i> , 137 Cal.App.3d 269, 276 n.3 (1982); <i>United States v. Moore</i> , 846 F.2d 1163, 1167 (8th Cir. 1988); <i>People v. Chambers</i> , 41 Cal.App.2d 23 (1965); <i>People v. Hill</i> , 23 Cal.App.4th 1566, 1573-74 (1994).	17

No.	Title	Authority	Page
20	Dog May Be Considered a Deadly Weapon	<i>People v. Nealis</i> , 232 Cal. App. 3d Supp. 1, 3 (1991); <i>Marley v. City of Allentown</i> , 774 F. Supp. 343, 345-46 (E.D. Penn. 1991), <i>aff'd</i> , 961 F.2d 1567 (3rd Cir. 1992)	21
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1 JURY INSTRUCTION NO. 1.

2 (All Persons Equal before the Law)

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4 This case should be considered and decided by you as an action between persons
5 of equal standing in the community, of equal worth, and holding the same or similar
6 stations in life. All persons stand equal before the law, and are to be dealt with as equals
7 in a court of justice.
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1 DEFENDANTS' OBJECTION TO PLAINTIFF'S NO. 1
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3 Plaintiff's proposed instruction is unnecessary, and the cited authority does not
4 support the instruction. In particular, the phrases "equal standing in the community" and
5 "stations in life" are vague and ambiguous and could confuse the jury.
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1 PLAINTIFF'S SUPPORT FOR NO. 1.
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4 This instruction serves as a reminder to the jury that the parties are on an equal
5 playing field, and that should the jury have any bias in favor of police officers, they must
6 put it aside. The legal proposition it asserts is a correct legal proposition. It is important
7 in this case particularly, because on the one hand, there is a law enforcement officer who
8 concededly is engaged in a lawful duty of taking someone into custody, and on the other
9 hand, there is someone who, concededly, although not at the time of the arrest, resisted
10 earlier, and interfered with the CHP efforts to discharge their lawful duty when she was
11 in the car being pursued and she did nothing to try to get Ms. Steinmeier to pull over and
12 stop the pursuit. There is a tendency among many people to think that a person gets what
13 they deserve; since she "resisted" earlier, ordering the dog to bite her, was fine. This
14 instruction is important to emphasize that the issue in this case is not whether it was
15 lawful to arrest, not whether the officers had a right to use some amount of force, but
16 whether the force Leyva did use, was reasonable or excessive. There is authority for
17 giving this instruction. Devitt, Blackmar & Wolff, 3 Federal Jury Practice and
18 Instructions §§ 71.03 (4th ed. 1987); *Graham v. Richardson*, 403 U.S. 365, 371, 372
19 (1971); *Takahashi v. Fish & Game Comm.*, 334 U.S. 410, 420 (1948); *Yick Wo v.*
20 *Hopkins*, 118 U.S. 356, 369 (1886); *Truax v Raich*, 239 U.S. 33, 39 (1915).

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1 JURY INSTRUCTION NO. 3.

2 (Testimony of Police Officer)

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4 The testimony of a police officer is entitled to no special or exclusive sanctity. A
5 police officer who takes the witness stand subjects his testimony to the same examination
6 and the same tests that any other witness does, and in the case of police officers you
7 should not believe them merely because they are police officers. You should recall their
8 demeanor on the stand, their manner of testifying, the substance of their testimony, and
9 weigh and balance it just as carefully as you would the testimony of any other witness.
10 People employed by the government, including policemen, do not stand in any higher
11 station in the community than other persons, and their testimony is not entitled to any
12 greater weight.

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1 DEFENDANTS' OBJECTION TO PLAINTIFF'S NO. 3
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3 Plaintiff's proposed instruction is unnecessary, and the cited authority does not
4 support the instruction.
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1 PLAINTIFF'S SUPPORT FOR NO. 3
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3 This is a statement to the jury that they cannot have any bias in favor of police
4 officers because police officers are not any more trustworthy or truthful than any other
5 person, simply by virtue of their employment. The jury instructions give very specific
6 instructions to the jury on how to decide a person's credibility, and this cannot be undone
7 simply because the witness is a police officer. *Darbin v. Nourse*, 664 F.2d 1109, 1114-15
8 (9th Cir. 1981).
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1 JURY INSTRUCTION NO. 4.

2 (Business Records -- Police Reports)

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4 Police reports are business records. The absence of an entry in a police report

5 concerning a matter is evidence of the nonexistence of that matter or event.

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1 DEFENDANTS' OBJECTION TO PLAINTIFF'S NO. 4
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3 Plaintiff's proposed instruction is unnecessary, and the cited authority does not
4 support the instruction. Moreover, the second sentence could confuse and/or mislead the
5 jury given its wording.
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1 PLAINTIFF'S SUPPORT FOR NO. 4
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3 Plaintiff intends to use omissions in Leyva's and other officers' reports as evidence
4 that claims they might make now, are untruthful and made up after-the-fact. This
5 instruction explains to the jury the actual import of when an officer leaves a material fact
6 out of his report, as opposed to plaintiff having only to rely on plaintiff's counsel's say-
7 so. See Federal Rules of Evidence Rule 803 (6), (7), (8), (10); California Evidence Code
8 §§ 1270, 1272; 28 United States Code §§ 1732, 1733; see *United States v. DeGeorgia*,
9 420 F.2d 889 (9th Cir. 1969) (car rental computer showed no record of car after a certain
10 date; admissible to prove car stolen).
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1 JURY INSTRUCTION NO. 5.

2 (Evidence of Guilt from Fabrication/Coverup)

3 As the factfinder, should you conclude that a party was dishonest about a material
4 fact, you are entitled to treat the dishonesty as evidence of that party's guilt. Similarly,
5 should you find that the party engaged in a coverup you may infer that the party has
6 consciousness of wrongdoing.

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1 DEFENDANTS' OBJECTION TO PLAINTIFF'S NO. 5
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3 Plaintiff's proposed instruction is unnecessary, and the cited authority does not
4 support the instruction. Moreover, the instruction could confuse and/or mislead the jury
5 given its wording, especially the term "guilt."
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1 PLAINTIFF'S SUPPORT FOR NO. 5
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4 This instructions relates specifically to the testimony of the officers (not only
5 Leyva, but also Edwards and Keene) regarding the giving of a warning, and the striking
6 of Ms. Rivera and Ms. Steinmeier. Fabrication and credibility are at the heart of this case.
7 This instruction is trying to bring to the jury's attention the significance of a fabricated
8 claim. It ties into consciousness of guilt, which ties into Leyva's knowledge he used
9 excessive force, which tends to be evidence that the force was excessive, as well as
10 evidence he should be liable for punitive damages.

11 See *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 147 (2000) (“In
12 appropriate circumstances, the trier of fact can reasonably infer from the falsity of the
13 explanation that the employer is dissembling to cover up a discriminatory purpose. Such
14 an inference is consistent with the general principle of evidence law that the factfinder
15 is entitled to consider a party’s dishonesty about a material fact as ‘affirmative evidence
16 of guilt.’ ”); *United States v. Davis*, 752 F.2d 963, 972 (5th Cir. 1985) (“[T]he coverup
17 attempts bear a logical relationship to the underlying fraud crimes.” * * * “Similarly,
18 evidence of Davis’ failure to produce subpoenaed documents and his alleged interference
19 with a witness in an upcoming proceeding against him would tend to establish Davis’
20 ‘guilty consciousness’ of the false statement and mail fraud charges.”); *Charles v. Cotter*,
21 867 F. Supp. 648, 663 (N.D. Ill. 1994) (“Defendants argue that since Charles has made
22 no conspiracy or cover-up claim in this action, evidence that a false vice report was
23 prepared is irrelevant and unfairly prejudicial because it suggests that a cover-up was
24 involved. To the extent that this evidence establishes that a cover-up was involved, such
25 evidence is damaging to the defendants--because it may indicate that defendant Cotter
26 believed he needed to hide something--but it is not unfairly prejudicial. Furthermore, this
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1 evidence goes straight to the heart of defendant Cotter's credibility--which will be a
2 critical issue in this case.”).

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1 JURY INSTRUCTION NO. 11.
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3 (Serious Bodily Injury--Defined)

4 “Serious bodily injury” refers to significant or substantial bodily injury or damage;
5 it does not refer to trivial or insignificant injury or moderate harm. Serious bodily injury
6 means a serious impairment of physical condition, including, but not limited to, the
7 following: loss of consciousness; concussion; bone fracture; protracted loss or
8 impairment of function of any bodily member or organ; a wound requiring extensive
9 suturing; and serious disfigurement. Injury which causes significant pain and requires
10 considerable time to heal can be serious bodily injury. Multiple abrasions or lacerations
11 or contusions can be serious bodily injury. Reasonable possibility of serious infection is
12 serious bodily injury.

14 An instrumentality inflicting serious bodily injury is not limited to a gun or a knife.
15 For example, striking with the hand or fist, kicking, choking, biting, or other comparable
16 means may constitute force reasonably capable of causing serious bodily injury.

17 To establish that the force used was reasonably capable of causing serious bodily
18 injury, it is not necessary to show that serious bodily injury was actually inflicted. It is
19 only necessary to show that the force used was reasonably capable of causing serious
20 bodily injury.

22 In determining whether an injury constitutes serious bodily injury as that term is
23 defined herein, it is irrelevant that medical treatment will alleviate or prevent permanent
24 disability caused by the injury.

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1 DEFENDANTS' OBJECTION TO PLAINTIFF'S NO. 11
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3 Plaintiff's proposed instruction is unnecessary, and the cited authority does not
4 support the instruction. Moreover, the second sentence could confuse and/or mislead the
5 jury given its vague and ambiguous wording.
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1 PLAINTIFF'S SUPPORT FOR NO. 11
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4 During trial, the jury will hear several witnesses testify about “serious bodily
5 injury.” Leyva and the other officers are expected they will testify as they did at
6 deposition, that San Diego County deputies are trained that they can use force reasonably
7 capable of causing serious bodily injury only when there is an immediate and credible
8 threat of death or serious bodily injury either to deputies or to some other person in the
9 community. Dr. Meade will also testify about how police dog bites cause serious bodily
10 injuries. Because this is the crux of plaintiff’s case (that Leyva was not allowed to order
11 his dog to bite unless there was an immediate threat of death or serious bodily injury to
12 himself or others), the jury should be informed as to what constitutes serious bodily
13 injury.

14 This instruction will be especially important should defendants’ witnesses testify
15 consistently with their theory proposed thus far, that Ms. Rivera’s injuries were an
16 aberration and that using a police dog *does not* cause serious bodily injury. The authority
17 for this instruction is found in:

18 First paragraph: *United States v. Sanchez*, 914 F.2d 1355, 1358-59 (9th Cir. 1990);
19 *United States v. Moore*, 846 F.2d 1163, 1166, 1167 (8th Cir. 1988) (*Moore* was cited with
20 approval in *Sanchez, supra*, 914 F.2d at 1359); Cal. Penal Code §§ 243(f)(5); *People v.*
21 *Escobar*, 3 Cal.4th 740, 746, 752 (1992); *People v. Johnson*, 104 Cal. App. 3d 598, 609
22 (1980) [defining “great bodily injury”].

23 Second paragraph: *Gonns v. United States*, 231 F.2d 907, 908 (10th Cir. 1956) [hitting
24 with fists, etc., may be force reasonably capable of causing great bodily injury]; *United*
25 *States v. Moore*, 846 F.2d 1163, 1164, 1167 (8th Cir. 1988) [biting constitutes force
26 reasonably capable of causing serious bodily injury because of risk of serious infection];
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1 *People v. Pallins*, 95 Cal. App. 2d 902 (1950) [biting constitutes force reasonably capable
2 of inflicting great bodily injury because of disfigurement]. *See also* discussion in *In re
3 Jose D.R.*, 137 Cal.App.3d 269, 276 n.3 (1982), wherein the court cites cases finding that
4 an automobile, large rock, razor blade, fingernail file, and a pillow have been found to be
5 deadly weapons under the facts of the relevant case.

6 Third paragraph: *United States v. Moore*, 846 F.2d 1163, 1167 (8th Cir. 1988) (“[I]t is
7 the *capacity* for harm in the weapon and its use that is significant, not the *actual* harm
8 inflicted.” [Emphasis in original]); *People v. Chambers*, 41 Cal.App.2d 23 (1965) [No
9 actual injury necessary].

10 Fourth paragraph: *People v. Hill*, 23 Cal.App.4th 1566, 1573-74 (1994).

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1 JURY INSTRUCTION NO. 20.
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4 (Dog may be considered a deadly weapon)
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7 A dog may be a deadly weapon if the person uses the dog to attack or threaten a
8 human, and the dog is trained to respond to the person and is capable of inflicting serious
9 injury.
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1 DEFENDANTS' OBJECTION TO PLAINTIFF'S NO. 20
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3 Plaintiff's proposed instruction is unnecessary, and the cited authority does not
4 support the instruction. Moreover, the *Nealis* case involves a criminal defendant and the
5 CA Penal Code definition of "deadly force", which are not relevant or instructive in this
6 case. Moreover, in *Marley*, the federal district court in Eastern Pennsylvania determined
7 that the law was clearly established that it was a constitutional violation for a police
8 officer to unleash a trained attack dog on a fleeing misdemeanant. This court should not
9 find that a district court opinion in the Third Circuit provides sufficient notice particularly
10 in light of *Chew v Gates*, 27 F. 3d 1432 (9th Cir. 1994). See *Watkins v. City of Oakland*,
11 145 F.3d 1087, 1092 fn. 1 (9th Cir. 1998). *Marley* also involved a very different set of
12 circumstances from this case, as the suspect was not hiding in that case.
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1 PLAINTIFF'S SUPPORT FOR NO. 20
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3 This instruction is to explain to the jury what *type* of tool the police dog is. It is a
4 tool on the use of force spectrum that is just shy of using a firearm. It is not like using a
5 baton or pepper spray, and it did not inflict such serious injuries here only because Ms.
6 Steinmeier kicked it. It is a deadly weapon because in all cases, it is capable of causing
7 death or serious bodily injury. *People v. Nealis*, 232 Cal.App.3d Supp. 1, 3, 283 Cal.Rptr.
8 376, 378 (1991) (direct quote); *Marley v. City of Allentown*, 774 F. Supp. 343, 345-46
9 (E.D. Penn. 1991), *aff'd*, 961 F.2d 1567 (3rd Cir. 1992).
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